



79.58 weeks of temporary total disability compensation as part of that settlement.<sup>1</sup> She did not receive treatment again until 1999 when she was injured cleaning the service department at Gary Hardy Dodge. She treated with a chiropractor, Dr. Ralph G. Trembly, for about one month. She last saw Dr. Trembly in August of 1999.

Claimant underwent a preemployment physical for respondent with Dr. Samir Desai on October 29, 1999. At that time claimant said she was not experiencing any back problems and denied any physical defects. Dr. Desai certified claimant as qualified in accordance with the Federal Motor Carrier Safety Regulations.<sup>2</sup>

Claimant alleges she was first injured on November 12, 1999. She described the incident this way: "I was being trained in a lift bus and I was sitting in the back where the ambulatory passenger seating is, which is right over the rear axil. And we were on a very rough street and after going over a bump, I was airborne off of the seat and when I came down on the seat I bottomed out and I felt a pain in my tailbone."<sup>3</sup> Claimant mentioned to the driver, Dee Laymon, that she had been airborne and hurt her tailbone when she came down. Claimant also suggested that the driver take a different route back as there was a smoother street she could take. The driver, however, used the same street again on the return trip and claimant again was bounced "airborne".

It was several days later according to claimant that claimant's supervisor, Mr. Bierman, noticed claimant was walking funny. He inquired what was wrong with her back and she answered that it wasn't her back but that she had pain in her leg and tailbone from being bounced in the lift bus. She did not request medical treatment, however, because she thought the pain would go away.

During her first two weeks of training, claimant worked the full 40-hour week. Thereafter, when she began driving on her own, claimant began working a considerable amount of overtime in addition to the 40 hours. Claimant described the bus routes as very rough with considerable bouncing. Claimant alleges her pain continued to worsen during this period.

After her work shift ended on February 21, 2000, claimant went to her chiropractor, Dr. Trembly. She told Dr. Trembly that she had pain since the incident at work during training but that the pain and burning sensation in her left leg had been worse since the past weekend. During the early morning hours of February 22, 2000, claimant was in so much

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<sup>1</sup> As claimant recalled she was working during her treatment following the 1990 injury, the ALJ surmised that this temporary total disability may have been paid in connection with vocational rehabilitation.

<sup>2</sup> Claimant's Exhibit 3 to Transcript of May 31, 2000 Preliminary Hearing.

<sup>3</sup> Preliminary Hearing at 11-12.

pain she could not sleep so she called a friend to drive her to the hospital emergency room. Several hours after being released, claimant returned to the hospital and was admitted.

The hospital emergency room physician took a history from claimant of an onset of pain when claimant was turning on a light at home. Claimant testified this incident was several weeks prior to the date she went in to the emergency room. That history was recorded as:

"Admitted today because of sciatic left leg pain. She was well until two weeks ago when she noticed spontaneous onset of spasm into her left post lateral calf at night. It progressed to an ache and moved approximately into the posterior thigh and buttock. She noticed it progressively worsening and got help from a local chiropractor."

While in the hospital claimant called the dispatcher, Sherry Langston, and explained why she would not be at work. After she was released from the hospital, claimant obtained an accident report from Mr. Bierman. Claimant was off work until March 15, 2000 when she returned on a part time basis. She eventually returned to full time duty on May 15, 2000.

The last day claimant drove a bus was February 20, 2000. Claimant's job changed from being a city bus driver to supervisor and her supervisor training began February 21. During this training on February 21, claimant was seated most of the 8-hour day which made her back very painful. Claimant said this was why she went to Dr. Trembly after work that day.

In a note dated March 8, 2000, Dr. Craig Yorke attributes claimant's condition to her work based upon a history that claimant's "leg pain began in November after two events while driving the bus in which she 'bottomed out' in the bus and had an axial compression force because of that." Claimant says she asked Dr. Yorke while at the hospital if driving could be the cause of her pain, but Dr. Yorke apparently did not recall this because in his March 8 note he described this history as new. Although claimant says she discussed this with the doctor at the hospital, she also said that she is not sure what was said because of the pain medication she was taking during that time.

When claimant saw Dr. Michael L. Smith at the suggestion of the adjustor for respondent's workers compensation insurance carrier, she gave a history of onset of back and left leg pain on November 12, 1999 with the bus incident. She told Dr. Smith about her 1990 episode with back and right leg pain but denied any prior left leg pain. But according to his office records, Dr. Trembly had found tenderness at the left sciatic notch, left popliteal space and left sacroiliac joint on July 20, 1999. Claimant saw Dr. Trembly nine times in July 1999 with left sided back and leg complaints. Claimant also treated seven times in August 1999. Her last date of treatment with Dr. Trembly before going to work for respondent was August 25, 1999. At that time her complaints were "left calf pain, left sciatic S-I and hip".

Mr. John Bierman, transportation manager for Topeka Metropolitan Transit Authority is claimant's supervisor. It is Mr. Bierman's recollection that the conversation claimant described occurred on claimant's first day on the job. Claimant was walking funny and he inquired about whether her back was hurting her. Claimant answered that her leg was bothering her.

Mr. Bierman has no recollection of claimant reporting a work related injury on or after November 12, 1999 until sometime after claimant's hospitalization in February 2000.

Mr. Bierman did not notice any change in claimant's physical condition during the time she was working. Claimant regularly volunteered to work extra shifts right up until the time she was promoted to supervisor.

#### **CONCLUSIONS OF LAW**

Workers have the burden of proof to establish their rights to compensation and to prove the various conditions upon which those rights depend.<sup>4</sup>

"Burden of proof" means the burden to persuade by a preponderance of the credible evidence that a party's position on an issue is more probably true than not when considering the whole record.<sup>5</sup>

Respondent contends claimant failed to provide timely notice of her accidental injury. Absent extenuating circumstances, K.S.A. 44-520 requires notice of accidental injury be given to the employer within 10 days. Claimant testified that a co-worker Dee Laymon, had knowledge of the November 12, 1999 incident and, in addition, claimant discussed her resulting injury with her supervisor, Mr. Bierman, shortly thereafter. Mr. Bierman disputes this. The parties agree that claimant discussed her injury with Mr. Bierman after she was released from the hospital. But this occurred more than 10 days after the ending date of the series of accidents. The ALJ found claimant did not give timely notice of accident. Claimant still contends she gave notice within 10 days of November 12, 1999 and within 10 days of February 20, 2000. But on appeal she also argues that if it is found she did not give notice within 10 days, then there was just cause for her failure to do so because she thought she would get better. She testified, however, that rather than improve, her symptoms continued to worsen after November 12, 1999. Credibility is an issue, therefore, both as to whether claimant reported her injury to Mr. Bierman within 10 days and, if not, whether there was just cause for her failure to do so.

Respondent also denies claimant has proven she suffered personal injury by accident arising out of and in the course of her employment. Respondent contends

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<sup>4</sup> Frazier v. Mid-West Painting, Inc., Docket No. 79,833 (Kan. 2000).

<sup>5</sup> K.S.A. 1999 Supp. 44-501(a).

claimant's injury is not related to any alleged accident at work but, instead, is the result of either her preexisting condition or an accident at home when she reached to turn on a light. Generally, workers compensation laws require an employer to compensate an employee for personal injury or aggravation of a preexisting condition that is incurred through accident arising out of and in the course of employment.<sup>6</sup> The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.<sup>7</sup>

Claimant attributes her condition to the alleged November 12, 1999 accident and also to a series of aggravations or accidents from performing her regular job duties each working day thereafter through February 20, 2000. She denies having any symptoms when she started working for respondent. Respondent presented evidence that suggests otherwise. Thus, credibility is at issue. It can be difficult to assess credibility when reading transcribed testimony. The ALJ, in evaluating the in-court testimony of the witnesses, has the advantage of being able to assess their demeanor. This puts the ALJ in a more favorable position than that of the Appeals Board for determining credibility. In circumstances such as this, where conflicting evidence provides more than one possible answer, the Appeals Board finds it appropriate to take into consideration the ALJ's unique position in assessing the credibility of witnesses.

Based on the record presented to date, claimant has failed to prove that she injured herself while working for the respondent and that respondent had timely notice of the accident.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing of the claim.<sup>8</sup>

**WHEREFORE**, the Appeals Board affirms the June 1, 2000, preliminary hearing Order Denying Compensation entered by Judge Benedict.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 2000.

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BOARD MEMBER

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<sup>6</sup> K.S.A. 1999 Supp. 44-501(a); Kindel v. Ferco Rental, Inc., 258 Kan. 272, Syl. ¶ 2, 899 P.2d 1058 (1995); Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987).

<sup>7</sup> Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

<sup>8</sup> K.S.A. 1999 Supp. 44-534a(a)(2).

c: Beth Regier Foerster, Topeka, KS  
Heather Nye, Kansas City, MO  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director